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Supreme Court, U.S.
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No. 96-387

In The
Supreme Court of the United States

October Term, 1996

JAMES L. DODARO, HOWARD YERUSALIM, FRANK URSOMARSO, JAMES F. MALONE, III, JOHN L. SOKOL, JR., S. MICHAEL PALERMO, JOSEPH L. DIRIENZO, SAMUEL S. CARNABUCI, MELVIN M. SHELTON, DEBORAH KOVAL, GEORGE PILECKI AND SEAN PILECKI,

Petitioners,

vs.

CHARLES CHRISTY,

Respondent.

On Petition For A Writ of Certiorari to the United States Court of Appeals For the Third Circuit

RESPONDENT'S BRIEF IN OPPOSITION

John P. Hickey
Counsel of Record
Kleinbard, Bell & Brecker
1900 Market Street, Ste 700
Philadelphia, PA 19103
(215) 496-7219

William Goldstein
Groen, Laveson, Goldberg & Rubenstone
Four Greenwood Sq., Ste 200
Bensalem, PA 19020
(215)638-9330

Attorneys for Respondent

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RESPONDENT'S BRIEF IN OPPOSITION

Respondent Charles Christy ("Christy") respectfully requests that this Court deny the petition for writ of certiorari seeking review of the Order of Dismissal entered by the Court of Appeals for the Third Circuit. The decision of the Third Circuit in this case is not inconsistent with existing federal law, nor does it reflect a split of authority among the Circuits.[1]

UNCITED SIGNIFICANT OPINIONS BELOW

Petitioners have failed to disclose the existence of two significant unreported Orders entered by the Court of Appeals for the Third Circuit in this case. The first order entered on December 29, 1995 permitted the Petitioners to file their brief and appendix on the merits for consideration *prior* to a ruling on Christy's Motion to Dismiss and is reproduced *infra* at Appendix 1a. The second order entered on January 29, 1996 referred Christy's Motion to Dismiss to the merits panel and required Christy to file a brief on the merits for consideration *prior* to a ruling on Christy's Motion to Dismiss and is reproduced *infra* at Appendix 1b.[2]

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[1] The Opinion of the United States District Court for the Eastern District of Pennsylvania is reported at 904 F. Supp. 427. The Order of Dismissal and the Order denying the petition for rehearing are unreported. Christy will refer to each of the foregoing decisions by reference to the Petitioners' Appendix (PA).

[2] The Third Circuit also issued an Order dated January 29, 1996 which granted Petitioners' request to file a supplemental brief and an Order dated March 18, 1996 which granted Christy's request to file a supplemental appendix. These Orders are unreported.

The Petitioner's also failed to cite an opinion entered by the District Court in this case on January 4, 1996 which denied Petitioners' request to certify issues (concerning whether the evidence was sufficient) for appeal and further explained the District Court's opinion denying each Petitioner's motion for summary judgment. This decision is reported at 912 F. Supp. 148[3].

JURISDICTION

Christy submits that under *Johnson v. Jones*, 115 S.Ct. 2151 (1995), this Court does not have jurisdiction to review the the order in question because the denial of qualified immunity to each of the Petitioners was based on a determination by the District Court that the pretrial record was sufficient to establish genuine issues of fact for trial.

COUNTER STATEMENT OF CASE

Procedural History

Christy commenced this action on June 22, 1993 by filing a complaint against the Pennsylvania Turnpike Commission (the "Commission"), Robert Brady, John Stewart, Vincent Greco and John Boschi, employees of the Commission (collectively, the "Original Defendants"), alleging, inter alia, that he was not promoted to the position of paint crew foreman by the defendants for partisan political reasons in violation of

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[3] The only reference to this decision in the petition for certiorari is found in footnote 2 on page 8. Petitioners fail to even provide a citation to this important decision which is discussed *infra*.

his First Amendment rights.[4] On October 27, 1993, after limited discovery, Christy sought leave to amend his complaint to add the Petitioners (each of whom was also directly and influentially involved in the deprivation of Christy's constitutional rights), assert additional claims based on his failure to receive a second promotion and to modify, sharpen and/or delete certain other claims. On November 12, 1993, the Original Defendants filed motions for summary judgment asserting Eleventh Amendment immunity on behalf of the Commission, qualified immunity on behalf of the individuals and lack of any genuine issue of material fact as to each Original Defendant.

Christy was granted leave to amend his complaint on February 3, 1994 and the District Court denied the Original Defendants' motions for summary judgment, in toto, on March 10, 1994. The Original Defendants appealed the District Court's denial of their motions for summary judgment to the Third Circuit on the grounds of Eleventh Amendment and qualified immunity. The Third Circuit initially found that the Commission was not entitled to Eleventh Amendment immunity and correctly dismissed the Original Defendants' appeal on qualified immunity grounds for lack of jurisdiction because the District Court ruled it could not find qualified immunity based on the facts at summary judgment. *Christy v. Pennsylvania Turnpike Commission*, 1995 WL 127077, *1 n.4 (3d Cir. March 27,1995), *on rehearing*, 54 F.3d 1140 (3d Cir.

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[4] The Original Defendants having previously lost *on the merits before both* the District Court and the Third Circuit on the issue of whether they were entitled to immunity are not parties to this appeal. *Christy v. Pennsylvania Turnpike Commission,* 845 F. Supp. 1107 (E.D.Pa. 1994), *aff'd.*, 54 F.3d 1140 (3d Cir. 1995), *cert. denied,* 116 S.Ct. 340 (1995).

1995).

On petition for rehearing, the original opinion was vacated and a new opinion issued by the Third Circuit without further argument or briefing which affirmed the District Court's denial of the Original Defendants' motions for summary judgment based on both Eleventh Amendment and qualified immunity grounds. In the revised opinion, the Third Circuit addressed the issue of whether it had jurisdiction to hear the Original Defendants qualified immunity appeal where the pretrial record contains genuine issues of material fact, as follows:

> The plaintiff contends that we lack jurisdiction to entertain this argument because the district court's decision was based on factual rather than legal grounds. We do not agree. We will not address this question at length, however, because it appears likely that the Supreme Court will soon resolve this question in *Johnson v. Jones*, No. 94-455, 1995 WL 243454 (Argued April 18, 1995).

Christy v. Pennsylvania Turnpike Commission, 54 F.3d 1140, 1143-44 n. 4 (3d Cir. 1995). A second petition for a rehearing was considered by the Chief Judge and thirteen Circuit Judges and ultimately denied apparently without any Circuit Judge voting in favor of a rehearing.

Several weeks after the Third Circuit entered its revised opinion, this Court rendered its unanimous decision in *Johnson*, holding that " . . . a defendant, entitled to invoke a qualified immunity defense, may not appeal a district court's summary judgment order insofar as that order determines whether or not the pretrial record sets forth a 'genuine' issue of

fact for trial." 115 S.Ct. at 2159. Had *Johnson* been decided prior to the Original Defendants' appeal, the Third Circuit would have dismissed their appeal for lack of jurisdiction rather than ruling against them on the merits. This Court refused to hear the Original Defendants' petition for certiorari seeking further review of their entitlement to qualified immunity. 116 S.Ct. 340 (1995).

Prior to the close of discovery, each Petitioner and each Original Defendant filed motions for summary judgment which the District Court declined to address until discovery had been completed. After reviewing 2,000 pages of evidence and over 300 pages of briefing, the District Court denied all motions for summary judgment, *in toto*.[5]

Petitioners did not contest the fact that Christy's First Amendment rights were clearly established and known to them. 904 F. Supp. at 434 (PA 14a). Instead, the Petitioners argued that they followed Commission promotional policy and in so doing could have reasonably believed that they had acted lawfully because those actions were not politically motivated. In denying qualified immunity to the Petitioners, the District Court correctly found that the voluminous record established

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[5] Petitioner Frank Ursomarso ("Ursomarso") filed a motion for reconsideration asserting that the "unique evidentiary record which exists as to Mr. Ursomarso" entitled him to judgment as a matter of law, which was ultimately granted by the District Court. *Christy v. Pennsylvania Turnpike Commission*, 912 F. Supp. 146, 147 (E.D.Pa. 1996). Indeed, Ursomarso was the only defendant who did not participate in any of the promotional decisions at issue in this case and had previously abstained from participating in personnel matters because he did not condone the Commission's personnel policy and procedures.

genuine issues of material fact as to the Petitioners' participation in and the underlying political motivation behind the decisions to deny Christy his promotions and concluded that:

> If Christy's allegations are true, then Joint Defendants knowingly used the procedures set forth in Policy Letter 65 to effectuate political patronage, which was clearly proscribed at the time. No public official could reasonably have believed that such knowing circumvention was legal, and for this reason we deny summary judgment.

904 F. Supp. at 434 (PA 15a).

Petitioner's assertion that the District Court relied on *allegations* rather than *facts of record* to deny qualified immunity is misleading. *See* Petition at 8. The District Court specifically addressed this issue in a subsequent opinion and made it clear that:

> Although we used the words "contention" and "allegation" instead of "evidence" and "averment" we believe it is clear from the context that it was, in fact, Christy's evidence that we examined and found sufficient to create genuine issues of material fact. Lest there be any doubt, however, we now clarify that this Court looked to Christy's specific evidence, not the allegations in his complaint or in his pleadings, and that any language to the contrary should be disregarded.

912 F. Supp. at 149 n. 2.

In an effort to circumvent this Court's decision in *Johnson* and to provide a basis for appellate jurisdiction where none existed, the Petitioner's filed a motion with the District Court seeking certification of various evidentiary issues for appeal to Third Circuit. On January 4, 1996, the District Court denied Petitioners' motion, *in toto*, finding that ". . . this case is squarely within the ambit of *Johnson*." 912 F. Supp. at 149. Petitioner's assertion that the District Court had not even cited *Johnson* is inaccurate. *See* Petition at 9.

After the Petitioners filed a notice of appeal, Christy filed a motion to dismiss for lack of jurisdiction based on this Court's decision in *Johnson*. On December 29, 1995, the Third Circuit entered an order permitting the Petitioners to file their brief and appendix on the merits for consideration *prior* to a ruling on Christy's motion to dismiss. *See* Appendix 1a-2a. The Third Circuit entered a second order on January 29, 1996 referring Christy's Motion to Dismiss to the merits panel and requiring Christy to file a brief on the merits for consideration *prior* to a ruling on Christy's Motion to Dismiss. *See* Appendix 1b.

The Petitioners failed to disclose the existence of these two significant orders in their petition for certiorari. Instead, the Petitioners argue that they did not receive any appellate review of District Court's decision denying qualified immunity. Petition at 10. However, prior to entering the Order of Dismissal, the Third Circuit reviewed extensive briefs on the merits submitted by the parties, heard oral argument on the merits and then decided based on its own independent review of the record that it lacked jurisdiction to hear this appeal. A petition for a rehearing was considered by the Chief Judge and thirteen Circuit Judges and ultimately denied apparently without any Circuit Judge voting in favor of a rehearing.

The Petitioners did in fact receive not one, but two appellate reviews of the extensive evidentiary record in this case.[6] A comparison of the decisions rendered by the Third Circuit in this case does not, as the Petitioners suggest, demonstrate that the Third Circuit has improperly narrowed the scope of appellate review after *Johnson*. Petition at 11-12 n. 3. Rather, the Third Circuit correctly applied this Court's decisions in *Johnson* and *Behrens v. Pelletier*, 116 S.Ct. 834 (1996) and found (after a thorough review of the pretrial record) that it was without jurisdiction to hear the Petitioner's qualified immunity appeal because the pretrial record set forth genuine issues of fact for trial. Further review of the District Court's denial of Petitioners' qualified immunity defense because of the existence of genuine issues of material fact for trial is unwarranted and precluded by this Court's decisions in *Johnson* and *Behrens*.

Factual Background

Turning a deaf ear and a blind eye to the extensive factual record developed by Christy and thoroughly reviewed by the District Court and the Third Circuit in this case, the Petitioners have filed this appeal in order to further delay a trial on the merits. In this appeal, the Petitioners may not challenge the sufficiency of the evidence but may only argue that all of the conduct which the District Court deemed to be adequately supported met the *Harlowe* standard of objective

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[6] The first pre *Johnson* review resulted in an affirmance of the District Court's determination that the Original Defendants were not entitled to qualified immunity. The second post *Johnson* review of an expanded factual record resulted in an Order dismissing the Petitioner's qualified immunity appeal but only after a thorough review of the entire record.

reasonableness. *Behrens*, 116 S.Ct. at 842. For this reason, the Petitioners' appeal must fail.

At issue in this case is the Petitioners' failure to promote Christy to the positions of Paint Crew Foreman and Regional Fleet Systems Manager. The Petitioners' have admitted that Christy was qualified for both positions and was among the top three candidates for the Paint Crew Foreman position. The Petitioners argue that they promoted Sean Pilecki and Frank Dunn instead of Christy because they were more qualified and not for partisan political reasons. The District Court, however, correctly determined that Christy had proferred sufficient evidence to the establish that the decisions not to promote him were in fact politically motivated.

Petitioners' assertion that the District Court did not cite any factual issues that would preclude a determination of qualified immunity is inaccurate and misleading. Petition at 10. Even a cursory review of the District Court's opinion reveals that there are a myriad of factual issues which support the District Court's decision to deny qualified immunity to the Petitioners.

For example, in denying qualified immunity to the Petitioners, the District Court found that there was sufficient evidence to establish that (i) Christy was more qualified than Sean Pilecki and Frank Dunn, the employees who received the promotions; 904 F. Supp. at 431 (PA 7a); (ii) Christy did not have and chose not to seek political sponsorship in order to obtain a promotion; *Id.* at 432-3 (PA 10a-13a); (iii) Christy needed the political support of either defendant Robert Brady (the Chairman of the Democratic Party in Philadelphia) or Senator Fumo or he would not be promoted; *Id.* at 433 (PA 12a); (iv) Sean Pilecki had political sponsorship from Robert

Brady; *Id.* at 433 (PA 12a); and (v) Frank Dunn had political sponsorship from Senator Mello; *Id.* at 433 (PA 12a).

In addition, the District Court found that there was sufficient evidence to establish that (i) the interview and evaluation process was a sham; *Id.* at 431-33 (PA 7a, 13a); (ii) the evaluations were purposely altered to make it appear as if Sean Pilecki and Frank Dunn were more qualified; *Id.* at 433-34 (PA 14a); (iii) the Petitioners' were aware that political patronage ensured promotions and participated in that program; *Id.* at 431 (PA 7a); and (iv) the Petitioners actively participated in a plan to support a candidate previously selected on the basis of political patronage; *Id.* at 433 (PA 13a).

Under *Johnson* and *Behrens*, the Petitioners are only permitted to argue on appeal that although they engaged in the conduct cited by the District Court, such conduct did in fact satisfy the *Harlowe* test of objective reasonableness. It is readily apparent, however, that such overtly unlawful conduct could never be considered to have been objectively reasonable. The District Court denied qualified immunity to the Petitioners because no reasonable official could have reasonably believed that compliance with the literal terms of the Commission's promotional policy would or could legitimize politically influenced promotional decisions. *Id.* At 434 (PA 15a).

There was more than sufficient evidence in the record to support the District Court's conclusions. Among the evidence cited by the District Court was affidavits and notes made by Christy during the promotional process; testimony provided by defendant John Boschi; an affidavit from Louis Sperduti (the former Paint Crew Foreman and supervisor to both Christy and Sean Pilecki); and testimony provided by Jim Sperduti (a mechanic at the Devault maintenance facility). *Id.*

at 431-34 (PA 7a-15a). However, the sufficiency of the underlying evidence which formed the basis for the District Court's opinion may not be challenged by the Petitioners in this appeal.

In cases where the District Court failed to identify all of the particular charged conduct that it deemed adequately supported, this Court has recognized that ". . . an appeals court may have to undertake a cumbersome review of the record to determine what facts the district court, in a light most favorable to the nonmoving party, likely assumed." *Behrens,* 116 S.Ct. at 842 (citing *Johnson*). The Third Circuit undertook this review even though the District Court identified the specific conduct that it deemed adequately supported.

In this regard, the District Court cited significant admissions made by Original Defendant John Boschi (Deputy Executive Director Maintenance Operations), who has already exhausted all of his pretrial appeal rights in this action and is awaiting trial. Mr. Boschi is a senior level Commission employee who oversees all maintenance operations, including the promotion of employees.[7] During a meeting between Christy and John Boschi on March 17, 1993 at 1:45 p.m. in the

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[7] Mr. Boschi developed and implemented the interview and evaluation procedures utilized to promote all maintenance employees, he selects the interviewers and prepares the evaluations for virtually all promotional decisions involving maintenance employees. The evaluations prepared by Mr. Boschi are submitted to the personnel committee who are required to recommend the "most qualified" applicant to the Commissioners who must either accept or reject the recommendation. Mr. Boschi was directly involved in the promotional decisions at issue in this case. *See, Christy*, 904 F. Supp. at 430-31 (PA 6a-7a).

Devault Maintenance Facility, Mr. Boschi admitted that: (i) promotions are made on the basis of political patronage; (ii) Sean Pilecki received the promotion because he was supported by Commissioner Brady; (iii) without political support Christy would never be promoted and (vi) Christy should align himself with Commissioner Robert Brady and Senator Fumo. 904 F. Supp. at 431 (PA 7a).[8] Mr. Boschi admits that he had the conversation but remembers its contents differently. *Id.* Mr. Boschi was in a unique position to control the promotional process and to ensure with the assistance of the Petitioners that the politically sponsored candidates would receive the promotions.

The District Court correctly found that Mr. Boschi's alleged admissions created at least a question of fact as to what type of promotional support Sean Pilecki and Frank Dunn had and whether Christy's lack of a political affiliation within the workplace prejudiced him. *Id.* At 433 (PA 12a-13a). These issues can only be resolved by a jury.

The only rebuttal offered by the Petitioners is that their is no evidence that they knew about the conversation or that they could be bound or influenced by it. Petition at 5. Whether the Petitioners knew about the conversation is irrelevant and has no bearing on this issues before this Court. Moreover, Boschi's admissions are binding on the Petitioners due to the agency relationship between Boschi and the Petitioners evidenced by Policy Letter 65 (which was expressly approved by all members of the personnel committee and the

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[8] Jim Sperduti, a Commission mechanic in the Devault maintenance facility, overheard the conversation between Christy and Mr. Boschi and supports Christy's recollection of the conversation. 904 F. Supp. at 431 (PA 8a).

Commissioners). Mr. Boschi had been given express written authority by both the personnel committee and the Commissioners with respect to decisions involving the promotion of maintenance employees.

The Petitioners' assertion that the record contained no facts whatsoever concerning Sean Pilecki's political affiliation is inaccurate. Sean Pilecki was politically aligned with Commissioner Brady, the Democratic Chairman of Philadelphia County, and political officials supported by him. 904 F. Supp. at 431 (PA 7a). Moreover, George Pilecki was a Township Supervisor and his wife was a Democratic County Chairwoman. George Pilecki admitted to Lou Sperduti that he was using his political connections to get his son a promotion. *Id.*

The District Court even acknowledged that the Commission's hiring policy (as opposed to its promotional policy) " . . . specifically allows for political influence." *Id.* at 432 n. 5 (PA 11a). Many of the Petitioners actually admitted that they divided up lower level jobs among the political parties. Dividing up jobs on the basis of political affiliation is a clear violation of this Court's decision in *Rutan v. Republican Party of Illinois*, 497 U.S. 62 (1990). The fact that the Petitioners routinely hire on the basis of political affiliation in violation of *Rutan* raises additional doubts as to the manner in which employees like Sean Pilecki (who was initially hired based on his political affiliation) are eventually promoted instead of more qualified employees like Christy who have far more seniority and experience.

Christy also submitted a detailed report prepared by Dr. Hobson, a personnel expert, which found that the Petitioners actions were not "objectively reasonable". The

report also highlighted inadequate training, supervision and enforcement of Commission personnel policies along with numerous other deficiencies. Although the District Court did not specifically cite this report in its opinion, the Petitioners chose not to submit an expert report to rebut the findings of Christy's personnel expert.

The foregoing evidence when viewed in a light most favorable to Christy together with the reasonable inferences which maybe drawn therefrom leads only to the conclusion that there are material issues of fact concerning the true nature and extent of each Petitioners' involvement in the failure to promote Christy for partisan political reasons in violation of his First Amendment rights. Petitioners' assertion that their are no genuine issues of material fact in support of Christy's claims is false, misleading and a gross mischaracterization of the record in this case.

SUMMARY OF THE ARGUMENT

The Third Circuit correctly dismissed the Petitioners' appeal under *Johnson* because the District Court's denial of qualified immunity to each of the Petitioners was based upon a determination that the pretrial record was sufficient to establish genuine issues of fact for trial. Prior to dismissing the Petitioners' appeal, the Third Circuit undertook a cumbersome review of the record to determine whether there were genuine issues of fact for trial. A further appellate review of the record in this case is unwarranted and precluded by this Court's decisions in *Johnson* and *Behrens*. The Third Circuit's decision to dismiss the Petitioners' appeal is consistent with the prevailing law in other jurisdictions.

REASONS FOR DENYING THE WRIT

I. The District Court's Determination That the Pretrial Record Was Sufficient to Establish Genuine Issues of Material Fact May Not Be Appealed under *Johnson*.

Whether the Petitioners' are entitled to qualified immunity in this case involves nothing more than a determination of whether the evidence could support a finding that the Petitioners' violated Christy's constitutional rights when they failed to promote him for partisan political reasons. *See* Factual Background *Supra.* In the instant appeal as in *Johnson*, there are material facts in dispute as to what the Petitioners did or did not do which precluded the District Court from determining that they were entitled to qualified immunity. The admissions made by Mr. Boschi in this case are in and of themselves sufficient to create genuine issues of material fact as to whether the Petitioners violated Christy's constitutional rights.

In *Johnson*, three police officers who were sued for excessive force in making an arrest claimed that they had not beaten the plaintiff and were not present while others did so. The district court denied their motion for summary judgment based upon qualified immunity because of deposition testimony that the three officers were present at the time of plaintiff's arrest and were in or near the room where plaintiff claimed to have been beaten. The police officers appealed on the basis that the record did not support a finding that there was a genuine issue of material fact as to their participation.

In *Johnson*, this Court found that where the defense of qualified immunity is based upon a factual assertion of non-

participation, such claim is too deeply entwined with the underlying merits of the case to qualify for interlocutory appeal. *Johnson,* 115 S.Ct. at 2156. In *Behrens,* this Court explained its holding in *Johnson* as follows:

> *Every* denial of summary judgment ultimately rests upon a determination that there are controverted issues of material fact, see Fed. Rule Civ. Proc. 56, and *Johnson* surely does not mean that *every* denial of summary judgment is nonappealable. *Johnson* held, simply, that determinations of evidentiary sufficiency at summary judgment are not immediately appealable merely because they arise in a qualified immunity case; if what is at issue is nothing more than whether the evidence could support a finding that particular conduct occurred, the question is not truly "separable" from the plaintiff's claim, and hence there is no "final decision" under *Cohen* and *Mitchell.*

Behrens, 116 S. Ct. at 842 (citing *Johnson*). Because the evidence cited by the District Court in this case could support a finding that the Petitioners violated Christy's constitutional rights when they failed to promote him for partisan political reasons, they are not entitled to an interlocutory appeal.

In this appeal, the Petitioners may not challenge the sufficiency of the evidence but may only argue that all of the conduct which the District Court deemed to be adequately supported met the *Harlowe* standard of objective reasonableness. *Behrens,* 116 S.Ct. at 842. Unlike *Behrens,* the District Court in the instant case did specifically identify the charged conduct that it deemed to be sufficiently supported. It is readily apparent that the conduct of the Petitioners cited by the District Court could never be considered to have been

objectively reasonable. In this regard, the District Court correctly found that:

> If Christy's allegations are true, then Joint Defendants knowingly used the procedures in Policy Letter 65 to effectuate political patronage, which was clearly proscribed at the time. *Rutan*, 497 U.S. 62, 110 S.Ct. 2729. No public official could have reasonably believed that such knowing circumvention was legal, and for this reason we deny summary judgment.

Christy, 904 F. Supp. 434.

Petitioners will have their opportunity at trial to persuade the jury that they did not participate in the denial of Christy's promotions for partisan political reasons in violation of Christy's constitutionally protected right to free speech and free association. However, having failed to persuade the District Court that there are no genuine issues of material fact as to their actual conduct, the Petitioners may not now pursue an interlocutory appeal and seek appellate review of the District Court's denial of their motion for summary judgment on the qualified immunity issue.

II. The Third Circuit Conducted a Review of the Record Prior to Dismissing the Petitioners' Appeal and Any Further Review of the Record is Precluded by *Johnson* and *Behrens.*

The Petitioners assert that "[r]ather than recognizing the significance of *Behrens*, the Third Circuit order in this case ignored it and continues to apply the *Johnson* exception broadly." Petition at 27. However, the Third Circuit did in fact correctly follow the guidelines established by this Court in both

Johnson and *Behrens* and had no alternative but to dismiss the Petitioners' appeal for lack of jurisdiction.

In *Johnson* and *Behrens*, this Court recognized that in cases where the District Court does not identify the particular conduct it deemed to be adequately supported, ". . . a court of appeals may have to undertake a cumbersome review of the record to determine what facts the district court, in the light most favorable to the nonmoving party likely assumed." *Behrens, 116 S.Ct. at 842.* The Petitioners conveniently overlook the fact that the Third Circuit did in fact undertake its own independent review of the record in this case prior to dismissing the Petitioners' appeal.

The Petitioners failed to disclose the existence of two Orders entered by the Third Circuit. The first order permitted the Petitioners to file their brief and appendix on the merits *prior* to ruling on Christy's motion to dismiss. *See* Appendix 1a -2a. The second Order referred Christy's motion to dismiss to the merits panel and required Christy to file a brief on the merits *prior* to ruling on Christy's motion to dismiss. *See* Appendix 1b. The Third Circuit could have dismissed the appeal without requiring the parties to submit briefs on the merits and without requiring an oral argument on the merits because the conduct of the Petitioners cited by the District Court could never be considered to have been objectively reasonable. However, the Third Circuit conducted its own independent review of the underlying facts and based on that review determined that it did not have jurisdiction.

The Petitioners have already had their appellate review and any further review is unwarranted and precluded by this Court's decisions in *Johnson* and *Behrens*. Petitioners suggest that the Third Circuit should have stated whether the factual

record would preclude a reasonable defendant in the position of each Petitioner from believing that he or she was complying with *Rutan*. Petition at 17. The answer to this question is obvious. Moreover, requiring the Third Circuit to provide its own detailed analysis of a record which contains genuine issues of material fact would render this Court's decisions in *Behrens* and *Johnson* meaningless.

III. The Third Circuit's Decision in This Case is Consistent With the Prevailing Law in Other Circuits.

The Petitioners assert that the Third Circuit's decision in this case is directly contrary to prevailing law in the Second, Fifth, Eight, Ninth and Eleventh Circuits. Petition at 18-27. In any of these circuits, the Petitioners assert that the *Johnson* decision would not have prevented the court from hearing their qualified immunity claim. Petition at 25.

None of these circuits would have accepted the Petitioners' appeal and many would likely have dismissed this appeal without conducting the independent review of the record performed by the Third Circuit. All of the other circuits have uniformly recognized, as they must, that the sufficiency of evidence may not be considered on appeal. Applying this basic rule to the instant appeal confirms that the Third Circuit's decision to dismiss the Petitioners' appeal for lack of jurisdiction was correct.

CONCLUSION

Evidently, the Petitioners (like the Original Defendants who lost their qualified immunity appeal on the merits before *Johnson* was decided) do not believe that it is possible for the

District Court, the panel or the Third Circuit en banc to have ruled against them had they really understood the law and the Petitioners' arguments. However, the Petitioners have identified no legal basis for their entitlement to repeated bites at the same apple. Quite simply, the Original Defendants were wrong when they first made these arguments, the Petitioners were wrong with they reasserted these arguments and they are still wrong. Accordingly, for all of the foregoing reasons, Petitioners' request for a writ of certiorari should be denied.

Respectfully submitted,

John P. Hickey
Counsel of Record
Kleinbard, Bell & Brecker
1900 Market Street, Ste 700
Philadelphia, PA 19103
(215) 496-7219

William Goldstein
Groen, Laveson, Goldberg & Rubenstone
Four Greenwood Sq., Ste 200
Bensalem, PA 19020
(215) 638-9330

Attorneys for Respondent

October 11, 1996

APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

December 20, 1995
C-54

No. 95-1995

CHARLES CHRISTY
v.
PENNSYLVANIA TURNPIKE, et al., Appellants
(EDPA D.C. No. 93-cv-3346 (JCJ))

Present: GREENBERG, COWEN and ALITO, Circuit Judges

1) Motion by appellants to expedite briefing and argument.

2) Letter treated as motion by appellants for extension of time to file brief and appendix until 01/05/96.

3) Motion of appellee for expedited summary dismissal of appellants' interlocutory appeal for lack of jurisdiction pursuant to internal operating procedure 10.6.

4) Response of all appellants in opposition to appellee's motion to dismiss appeal for lack of jurisdiction.

Lenore R. Benoit 597-5017
Deputy Clerk

Response due 12/28/95

ORDER

The appellants shall file and serve their brief and appendix on the merits of the case on or before January 5, 1996, which shall also include any response to the Motion to Dismiss beyond that in the response filed on December 26, 1995. The court will thereafter determine whether to require a brief from the appellee on the merits of the appeal depending upon whether the appeal is being dismissed.

By the Court,

_____

December 29, 1995

APPENDIX B

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

NO. 95-1995

CHARLES CHRISTY

v.

PENNSYLVANIA TURNPIKE, et al.,

Appellants

PRESENT: GREENBERG, COWEN, and ALITO, Circuit Judges

ORDER

The motion to dismiss the appeal is referred to the merits panel. The appellee shall serve and file his brief on the merits within 30 days.

BY THE COURT:

_____
Circuit Judge

DATED: January 29, 1996